

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TYRONE ROGERS,
CDC #V-35389,

Plaintiff,

vs.

G. J. GIURBINO; D. URIBE;
P. KUZIL-RUAN; B. NARVIS,

Defendants.

Civil No. 11cv0560 IEG (RBB)

ORDER

**(1) GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT; AND**

**(2) DENYING PLAINTIFF'S EX PARTE
APPLICATION**

[ECF Nos. 74, 92]

Plaintiff Tyrone Rogers ("Rogers"), a state prisoner incarcerated at Centinela State Prison ("CEN"), is proceeding pro se and in forma pauperis with a Second Amended Complaint ("SAC") in his 42 U.S.C. § 1983 civil rights action filed nearly two years ago. He alleged under several legal theories, that his religious exercise was infringed during certain prison lockdowns over an approximate fourteen month period. Only one of his original claims and one named defendant have survived dismissal in prior proceedings. The remaining claim alleges the suspensions of religious group assembly during the prison lockdowns violated Rogers' rights under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C.A. §§ 2000cc et seq. This matter is now before the Court on remaining defendant Facility B Captain P. Kuzil-Ruan's Fed.R.Civ.P. 56 Motion For Summary Judgment ("Motion") on that claim. In consideration of the evidence presented and controlling legal authority, for the reasons discussed below, the Motion is **GRANTED**.

1 **I. BACKGROUND**

2 Rogers' claim arises from three prison lockdowns at CEN for weapons searches in May, June,
 3 and August 2010, each lasting about ten days, and a series of "rolling lockdowns" between March 2010
 4 and June 2011, each lasting one day at two- to four-day intervals. Defendants describe the rolling
 5 lockdowns as "intermittent modification to the normal programming" mandated by "a Three-to-Five
 6 Percent Staff Redirection Plan prepared by CDCR." (ECF No. 74-1 at 10.)¹ During the lockdowns,
 7 Rogers was prevented from assembling with other Protestants for fellowship, group prayer services, and
 8 ministry classes. (SAC 4-5, ECF No. 8)² The Court dismissed defendant B. Narvis before service of
 9 the SAC, along with Rogers' Eighth Amendment and access to courts claims. (ECF No. 9.) By Order
 10 entered February 14, 2012, the Court granted in part and denied in part defendants' Motion To Dismiss
 11 the SAC for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6), dismissing defendants G. J.
 12 Giurbino and D. Uribe and disposing of his First and Fourteenth Amendment claims, leaving only his
 13 RLUIPA claim against defendant B-Yard Facility Captain P. Kuzil-Ruan ("Kuzil-Ruan"). (ECF No.
 14 33.) Kuzil-Ruan then filed her Answer. (ECF No. 34).

15 Kuzil-Ruan now moves for summary judgment on the RLUIPA claim pursuant to Fed.R.Civ.P.
 16 ("Rule") 56 ("Motion"). (ECF No. 74.) She contends: "(1) The undisputed facts show that there was
 17 not a substantial burden on Plaintiff's exercise of religion as alleged in Plaintiff's Second Amended
 18 Complaint and Defendant therefore did not violate [the RLUIPA]; (2) The undisputed facts show that
 19 Defendant and her successors had a compelling government interest in undertaking the actions alleged
 20 in the Second Amended Complaint and undertook those actions by the least restrictive means after
 21 considering options and therefore did not violate RLUIPA; (3) The undisputed facts show that Plaintiff
 22 is not entitled to damages as a matter of law under RLUIPA." (ECF No. 74 at 2.) Rogers filed an
 23 Opposition (ECF No. 81), and Kuzil-Ruan filed a Reply (ECF No. 88).

24 ¹ Kuzil-Ruan represents that, "[d]uring discovery," Rogers expanded the scope of his claim "to include
 25 the intermittent modified programming as well as his three ten-day lockdowns, calling them 'rolling lockdowns.'" (ECF No. 74-1 at 10 n.2: "Because of the liberality permitted with amendments as well as the lack of prejudice
 26 to Defendant, Defendant addresses the 'rolling lockdowns'" as part of the SAC. Actually, Rogers' SAC expressly
 challenges both categories of lockdown as RLUIPA violations. (See, e.g., SAC at 1, 5, 7, 12-13.)

27 ² Page numbers for docketed materials cited in this Order refer to those imprinted by the Court's
 28 electronic case filing system.

1 **II. DISCUSSION**

2 **A. Legal Standards**

3 **1. The Civil Rights Act**

4 The Civil Rights Act, 42 U.S.C. § 1983 ("Section 1983") created a procedure for the vindication
 5 of federal rights, providing "the vehicle whereby plaintiffs can challenge actions by governmental
 6 officials." Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002); Graham v. Connor, 490 U.S. 386, 393-
 7 94 (1989) ("[Section] 1983 'is not itself a source of substantive rights,' but merely provides 'a method
 8 for vindicating federal rights elsewhere conferred' ") (citation omitted). "To prove a case under section
 9 1983, the plaintiff must demonstrate that (1) the action occurred 'under color of state law' and (2) the
 10 action resulted in the deprivation of a constitutional right or federal statutory right." Jones, 297 F.3d
 11 at 934 (citations omitted). There is no dispute that Kuzil-Ruan, a prison official participating in the
 12 implementation of lockdowns that suspended institutional programming including communal religious
 13 exercise in which Rogers participated, was acting under color of state law. He states his remaining
 14 claim arising from those interruptions as violations of rights conferred by the federal RLUIPA statute.

15 **2. Summary Judgment**

16 Any party "may move, with or without supporting affidavits, for summary judgment on all or
 17 part of [a] claim." Rule 56(a), (b). Summary judgment is properly entered "if the pleadings, the
 18 discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to
 19 any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c); *see*
 20 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "A material issue of fact is one that affects the
 21 outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." S.E.C.
 22 *v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). The materiality of facts is determined by
 23 looking to the substantive law defining the elements of the claim. *See Anderson*, 477 U.S. at 248.

24 The moving party is not required to produce evidence negating the non-movant's claims but does
 25 bear the "burden of showing the absence of a genuine issue as to any material fact. . ." Adickes v. S.H.
 26 Kress & Co., 398 U.S. 144, 157 (1970); *see Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255 (1986)
 27 (the court considers all the evidence in the light most favorable to the non-moving party and accepts the
 28 version of disputed facts most favorable to that party in deciding whether there is a genuine issue for

1 trial). If the moving party fails to discharge its initial burden to show "the absence of a genuine issue
 2 concerning a material fact," summary judgment must be denied, and the court need not consider the non-
 3 moving party's evidence. Adickes, 398 U.S. at 159-60.

4 If the movant carries its burden, the burden then shifts to the non-moving party to establish facts
 5 beyond the pleadings that show there remains a disputed issue of material fact so that summary
 6 judgment is not appropriate. The opposing party may not rest on conclusory allegations or mere
 7 assertions. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Rather, it must identify specific
 8 facts showing there are "genuine factual issues that properly can be resolved only by a finder of fact
 9 because they may reasonably be resolved in favor of either party." Anderson, 477 U.S. at 250. The non-
 10 moving party must "go beyond the pleadings and by her own affidavits, or by 'the depositions, answers
 11 to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue
 12 for trial.'" Celotex, 477 U.S. at 324, quoting Rule 56(e); *see Adickes*, 398 U.S. at 157. "[S]ummary
 13 judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable
 14 jury could return a verdict in its favor." Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919
 15 (9th Cir. 2001) (internal punctuation and citation omitted).

16 When the Court considers evidence from both sides, "[i]f reasonable minds could differ as to the
 17 import of the evidence" and there is "evidence on which the jury could reasonably find for either party,"
 18 summary judgment for the moving party must be denied. Anderson, 477 U.S. at 250-51, 254.
 19 Conversely, summary judgment must be entered in favor of the moving party "if, under the governing
 20 law, there can be but one reasonable conclusion as to the verdict." *Id.* at 250-251; Celotex, 477 U.S.
 21 at 325. In deciding the motion, a district court does not make credibility determinations, weigh
 22 conflicting evidence, or draw inferences, as those are functions reserved for the trier of fact. Anderson,
 23 477 U.S. at 249, 255, 249; *see Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 888 (1990) ("In ruling
 24 upon a Rule 56 motion, 'a District Court must resolve any factual issues of controversy in favor of the
 25 non-moving party' only in the sense that, where the facts specifically averred by that party contradict
 26 facts specifically averred by the movant, the motion must be denied").

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1 **B. Rogers Was Advised Of The Motion's Potential Consequences And Of His**
 2 **Opposition Obligations**

3 Among her Motion papers served and filed on November 13, 2012, Kuzil-Ruan provided Rogers
 4 with a "Warning To Plaintiff Regarding Opposing Summary Judgment" that conforms to the
 5 requirements of Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc). (ECF No. 74-2.)
 6 The Rand court applied the rule from Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988) establishing
 7 notice as a substantial right to require that pro se prisoners pursuing relief under 42 U.S.C. § 1983 must
 8 be advised of the rules codified at Rule 56 and of the consequence that the case will be dismissed
 9 without a trial if the defendant's summary judgment motion is granted. In particular, Rogers received
 10 notice of his obligation to produce evidence to create a triable material fact in order to avoid that
 11 consequence. In addition, this Court reiterated the Rand notice to Rogers in its November 15, 2012
 12 Order continuing the December 17, 2012 Motion hearing date to January 22, 2013. (ECF No. 75.)

13 Despite those notices, Rogers' Opposition is deficient. He produces no evidence as defined by
 14 Rule 56 in support of his Opposition. Rather than substantiate a material issue of fact "that affects the
 15 outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth,"
 16 Seaboard Corp., 677 F.2d at 1306, he continues to rely on vague allusions to unspecified "genuine facts"
 17 and purported evidence from unidentified individuals or other sources he suggests he could develop if
 18 only discovery were reopened. (*See* ECF No. 81 at 2, 4, 9,10.) His supporting "Declaration" consists
 19 solely of his attestation that his conclusory arguments are "true and correct to the best of [his]
 20 knowledge," and that "if called [he] would testify to the same." (ECF No. 81 at 10-11.) Exhibit A to
 21 his Opposition consists of two pages from the Department of Corrections and Rehabilitation Operations
 22 Manual addressing incident reporting procedures. (*Id.* at 12.) Exhibit B consists of a Memorandum
 23 directed to "Associate Directors, Division of Adult Institutions" and "Wardens" dated February 2, 2010,
 24 setting out the "3 and 5 Percent Redirection Plans" to address reduced institutional staffing issues, a
 25 Memorandum dated August 10, 2010 on the subject of the "Three Percent Position Reduction
 26 Assessment" (*Id.* at 14-15), and a Director's Level Appeal Decision denying Rogers relief from his
 27 challenge to the "rolling" lockdown periods on grounds, among others, that they "are not allowing for
 28 religious attendance." (*Id.* at 16-17.) Exhibit C is a May 23, 2011 Fact Sheet summarizing the United

1 States Supreme Court's ruling affirming that California must comply with an order to reduce its prison
 2 population. (*Id.* at 18.)

3 Rogers has had ample opportunity to develop the factual and evidentiary bases for his RLUIPA
 4 claim. He initiated this action on March 21, 2011 and filed the operative pleading, his SAC, on July 12,
 5 2011. (ECF No. 8). Nevertheless, along with his Opposition (ECF No. 81), he filed an "Ex Parte
 6 Motion To Stay Summary Judgment Until Plaintiff Can Obtain Discovery Necessary To Oppose" (ECF
 7 No. 82), followed on December 20, 2012 by a motion seeking to add additional defendants (ECF No.
 8 85) and a "Second Request" for production of documents (ECF No. 86), both purportedly to enable him
 9 to oppose the Motion. By Order entered December 21, 2012, this Court denied those requests, noting
 10 that the time for such motions had passed under the April 11, 2012 Scheduling Order governing the case
 11 (ECF No. 47), and that Rogers had not attempted the good cause showing required to reopen discovery
 12 or to amend pleadings beyond those deadlines. (ECF No. 87.) The Court further observed it had
 13 already dismissed the defendants Rogers proposed to add and had "repeatedly denied Plaintiff's attempts
 14 to add these same defendants and related claims." (*Id.* at 1-2.) On January 25, 2013, the Court denied
 15 yet another of his ex parte motions to reopen discovery or to amend the pleadings (ECF No. 90), noting
 16 that the motion was simply "the latest in a long line of repetitive requests to reopen discovery or amend
 17 the pleadings . . ." (ECF No. 91 at 1.) The Court reminded him that under the Scheduling Order,
 18 "discovery closed October 15, 2012, and the deadline for motions to join parties or otherwise amend the
 19 pleadings passed July 16, 2012." (*Id.*)

20 Despite the Opposition deficiencies, in deciding this Motion, the Court has considered all the
 21 evidence properly before it in the light most favorable to Rogers. Anderson, 477 U.S. at 255; Celotex,
 22 477 U.S. at 324. That evidence includes excerpts from Rogers' October 12, 2012 Deposition that Kuzil-
 23 Ruan provides in support of her Motion as Exhibit A to the Findley Declaration, ECF No. 74-7.

24 **C. Rogers Fails To Identify A Triable Issue Of Material Fact On His RLUIPA Claim,
 And Defendant Is Entitled To Judgment As A Matter Of Law**

25 **1. The RLUIPA**

26 Congress passed the RLUIPA "to 'protect[] institutionalized persons who are unable freely to
 27 attend to their religious needs and are therefore dependent on the government's permission and
 28

1 accommodation for exercise of their religion.' " Khatib v. County of Orange, 639 F.3d 898, 900 (9th
 2 Cir. 2011), quoting Cutter v. Wilkinson, 544 U.S. 709, 721 (2005). The enactment creates a statutory
 3 basis for "protect[ing] prisoners and other institutionalized people from government infringement on
 4 their practice of religion." Mayweathers v. Newland, 314 F.3d 1062, 1065 (9th Cir. 2002); see Cutter,
 5 544 U.S. at 715. Section 3 of the RLUIPA provides:

6 No government shall impose a substantial burden on the religious exercise of a person
 7 residing in or confined in an institution . . . , even if the burden results from a rule of
 8 general applicability, unless the government demonstrates that imposition of the burden
 on that person – (1) is in furtherance of a compelling governmental interest; and (2) is
 the least restrictive means of furthering that compelling governmental interest.

9 42 U.S.C.A. § 2000cc-1(a).

10 By codifying a "compelling governmental interest" standard, the RLUIPA extends federal
 11 statutory protection to prisoners' religious exercise beyond the protections embodied in the federal
 12 Constitution. Under traditional First Amendment jurisprudence, a prisoner's free exercise claims are
 13 analyzed under the deferential "rational basis" standard of Turner v. Safley, 482 U.S. 78 (1987). See
 14 Beard v. Banks, 548 U.S. 521, 528-30 (2006) (courts analyze the competing interests of necessary prison
 15 regulations and First Amendment rights by finding a regulation valid if it is " 'reasonably related' to
 16 legitimate penological interests"), quoting Turner, 482 U.S. at 87. In contrast, the RLUIPA "requires
 17 the government to meet a higher burden of proof than the rational basis standard of Turner." Pierce v.
 18 County of Orange, 526 F.3d 1190, 1209 n.19 (9th Cir. 2008), citing Greene v. Solano County Jail, 513
 19 F.3d 982 (9th Cir. 2008). To satisfy the statute, the government must show "that the burden it imposes
 20 on religious exercise is in furtherance of a compelling governmental interest; and is the least restrictive
 21 means of furthering that compelling governmental interest." Greene, 513 F.3d at 986 (internal
 22 quotations omitted), citing Cutter, 544 U.S. at 717.

23 Nevertheless, "[w]hile [the RLUIPA] adopts a 'compelling government interest' standard,
 24 '[c]ontext matters' in the application of that standard." Cutter, 544 U.S. at 722-23 (citation omitted).
 25 "We do not read RLUIPA to elevate accommodation of religious observances over an institution's need
 26 to maintain order and safety"; rather, "[o]ur decisions indicate that an accommodation must be measured
 27 so that it does not override other significant interests." Id. at 722. Courts are expected to apply the
 28 standard with "due deference to the experience and expertise of prison and jail administrators in

1 establishing necessary regulations and procedures to maintain good order, security and discipline,
 2 consistent with consideration of costs and limited resources." *Id.* at 723 (internal punctuation and
 3 citation omitted).

4 "[T]he plaintiff shall bear the burden of persuasion on whether the law (including a regulation)
 5 or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of
 6 religion." 42 U.S.C. § 2000cc-2(b). The RLUIPA defines "religious exercise" to include "any exercise
 7 of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §
 8 2000cc-5(7)(A); *see also Cutter*, 544 U.S. at 715. The statute expressly instructs it "shall be construed
 9 in favor of broad protection of religious exercise." 42 U.S.C. § 2000cc-3(g). Once the plaintiff
 10 identifies "the 'religious exercise' allegedly impinged upon," courts "ask whether the prison regulation
 11 at issue 'substantially burdens' that religious exercise" in consideration of the plaintiff's showing.
 12 *Greene*, 513 F.3d at 987; *see Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005) (To be found
 13 a "substantial burden" on "religious exercise", the action "must impose a significantly great restriction
 14 or onus upon such exercise") (citation omitted); *Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008).
 15 If the plaintiff makes that showing, to avoid liability the defendant must demonstrate that the imposed
 16 burden "furthers a compelling governmental interest, and does so by the least restrictive means."
 17 *Greene*, 513 F.3d at 988 (internal punctuation and citations omitted); 42 U.S.C.A. § 2000cc-1(a).

18 **2. Substantial Burden On Religious Exercise**

19 Rogers argues the restrictions on his ability "to assemble with fellow Protestants during the
 20 lockdown periods" to "liv[e] our Protestant faith" substantially burdened his right to freely exercise his
 21 religion in violation of the RLUIPA. (SAC at 4.) Group worship is an example of religious exercise.
 22 *See Cutter*, 544 U.S. at 720. "We have little difficulty concluding that an outright ban on a particular
 23 religious exercise is a substantial burden on that religious exercise." *Greene*, 513 F.3d at 988. In this
 24 Court's Order dismissing all but Rogers' RLUIPA claim, the Court found he stated a *prima facie*
 25 RLUIPA claim by pleading sufficient facts "to show that the May, June and August 2010 lockdowns
 26 'substantially burdened' his ability to exercise his religion, and specifically his ability to 'liv[e] out his
 27 Protestant faith' by restricting his ability to 'attend weekend (Sat. & Sun.) Protestant fellowship, Sunday
 28 morning prayer service, and Saturday morning Bible study classes' during those times 'in violation of

1 RLUIPA." (ECF No. 33 at 12-13.) Kuzil-Ruan appears to concede the three ten-day lockdown periods
 2 Rogers challenges "substantially burdened" that aspect of his religious exercise.

3 Concerning the "rolling lockdowns", Kuzil-Ruan describes them as "one-day lockdowns
 4 implemented to spread staff shortages across an institution to prevent either irregular lockdowns or one
 5 yard from being locked down for a significant period of time," a practice that "lasted from March, 2010
 6 through June, 2011" due to the three and five percent staff reduction plans. (ECF No. 88 at 3; Kuzil-
 7 Ruan Decl. ¶ 14.) Those lockdowns "were typically every fourth day, but never occurred two days in
 8 a row." (ECF No. 88 at 3; Kuzil-Ruan Decl. ¶ 15.) Rogers acknowledges the rolling lockdowns never
 9 occurred more than one day in a row. (Findley Decl. Exh. A, Rogers Depo., ECF No. 74-7 at 56-57:
 10 "Q: . . . [O]ther than the three ten-day lockdowns . . . , you'd have one day rolling lockdown and the
 11 next day it would be normal programming? A: Correct.") In characterizing their effect on Rogers'
 12 religious exercise, Kuzil-Ruan argues "[t]he rolling lockdowns were therefore, at most, a temporary and
 13 intermittent ban on group worship . . . not a substantial burden on Plaintiff's exercise of his religion."
 14 (ECF No. 88 at 3-4, citing Lewis v. Ollison, 571 F.Supp.2d 1162, 1170-71 (C.D.Cal. 2008), dismissing
 15 on a Rule 12(b)(6) motion a RLUIPA claim challenging a prison policy requiring that inmates escorted
 16 to the showers be dressed in boxers and shower shoes rather than in more modest clothing preferred by
 17 Islamic inmates, implemented during temporary periods of heightened security to avoid weapons
 18 concealment, because the policy did not significantly interfere with their religious exercise and was in
 19 furtherance of a legitimate penological interest.)

20 Although Rogers fails to produce evidence to refute Kuzil-Ruan's characterization of the effect
 21 of the rolling lockdowns on his religious exercise, her description appears to acknowledge that group
 22 worship was banned sometimes, presumably when the lockdown day fell on a Saturday or a Sunday or
 23 other normal-programming religious fellowship days, as almost certainly occurred over the course of
 24 the many months the policy was in place. Therefore, construing the evidence in the light most favorable
 25 to Rogers, as the non-moving party, Anderson, 477 U.S. at 255, the Court assumes solely for the purpose
 26 of deciding this Motion that the total ban on group religious exercise on those days imposed a
 27 substantial burden on Rogers' religious exercise. Greene, 513 F.3d at 988.

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1 3. Compelling Government Interest

2 Rogers alleges the defendants violated his RLUIPA rights "by the implementation and
 3 administering the [sic] wanton 3% to 5% Redirection Plan, plus the allowance of the unnecessary three
 4 ten day lockdowns occurring between March 2010 through June 2011." (SAC at 8.) He characterizes
 5 the Plan as an "unconstitutional policy" that caused both the use of "unnecessary rolling lockdowns" as
 6 well as the three ten-day lockdown periods. (SAC at 2-5.) He alleges the institution "self-created" the
 7 lockdowns and therefore cannot show that a "compelling government interest" motivated them. (SAC
 8 at 9: "[T]he Supreme Court declares California's ideology and methodology created their own budget
 9 problems," both of which constitute "systemic administrative failures which cause the overcrowding").
 10 He summarily argues "Defendants do not deserve summary judgment to suspend Plaintiff's Protestant
 11 group worship, group prayer, and group studies." (ECF No. 81 at 4: "Plaintiff alleges that Defendants[']
 12 ideology and metho[do]logy does not warrant summary judgment" and "Defendants did not use the least
 13 restrictive means to deny Plaintiff's RLUIPA faith services.")

14 In addition, Rogers infers that the weapons search reasons for the three ten-day lockdowns were
 15 pretextual justifications.

16 The B-Yard Facility under the direction of acting Captain P. Kuzil-Ruan violated
 17 Plaintiff['s] and other inmates' RLUIPA . . . civil rights to normal religious service . . .
 18 when on three distinct occasions frivolously ended inmates['] normal program when: (1) On May 18 thru May 28, 2010, a wanton State of Emergency (CCR 3383) lockdown
 19 developed behind the B-Yard Medical Staff (MTA) knowingly released scissors to the
 20 C-Yard MTA; (2) On June 12 thru June 22, 2010, a wanton CCR-3383 lockdown behind
 Correction Officer Byfield (Build-1) lost a single bullet enclosed within a highly secure
space, free of inmate connection; and (3) On August 13 thru August 24, 2010, another
wanton CCR 3383 lockdown developed behind a supposed missing dental tool.

21 (SAC at 3-4 (exhibit reference omitted).

22 In particular, regarding the May 2010 lockdown, Rogers testified at his October 2, 2012
 23 deposition he believes that no scissors were missing and that the "true reason" for the May lockdown
 24 was that a correctional officer propositioned "a female free staff", she refused, and the correctional staff
 25 consequently instituted a lockdown. (Findley Decl. Exh. A, ECF No. 74-7 at 40-42.) Regarding the
 26 June 2010 lockdown, he acknowledged it "occurred because of the loss of a single bullet in the tower,"
 27 but infers no lockdown was necessary because the tower "is located within Building 1 in a secure –
 28 inmate-free, highly secure place." (*Id.* at 42.) When asked whether he believes there was a different

1 reason for that lockdown, he replied: "I have no idea what the reason for that was. . . . I'm just
 2 suspicious with that lockdown as I am with the lockdown that occurred . . . in May." (*Id.* at 43, 47-49.)
 3 Regarding the August 2010 lockdown, he contended, "There has not been one shred of evidence that
 4 the dental tool was ever missing" and he believed that lockdown was "just another way of helping out
 5 the . . . budget problem that the CDCR was under," to "save costs," but acknowledged he was unaware
 6 of any evidence to support that argument. (*Id.* at 44-45.) Rogers' mistrust of the official explanations
 7 for the three ten-day lockdown periods does not qualify as evidence adequate to defeat a properly
 8 supported summary judgment motion. Rule 56; Anderson, 477 U.S. at 249-50, 256; Celotex, 477 U.S.
 9 at 324; Adickes, 398 U.S. at 157; *see also Arpin*, 261 F.3d at 919. He similarly argues:

10 Defendants admit that the rolling lockdowns are design due to reduce [sic] cost saving,
 11 overtime pay, reduction of cost, and vacant positions, in-which hampers [sic] Plaintiff's
 12 RLUIPA rights to group worship, group pray, and group study, then Plaintiff has stated
 a[] RLUIPA claim. 42 U.S.C. §2000cc-1(a) & 42 U.S.C. §1997 [sic].

13 (ECF No. 81 at 9.)

14 However, at the summary judgment stage, Rogers was required to do more than merely "state
 15 a claim." In support of her Motion, Kuzil-Ruan submits the explanatory Declarations of four Facility
 16 B Captains during the relevant time periods, including her own.

17 The lockdown from May 18, 2010 through May 28, 2010 was required by the
 18 loss of a pair of scissors on Facility B. On May 16, 2010, the medical staff reported to
 19 the Facility B Lieutenant that a pair of scissors was missing from the Facility B Medical
 20 clinid. (Kuzil-Ruan Decl. ¶ 7.) The Lieutenant reported it to Captain Kuzil-Ruan. (*Id.*)
 21 Scissors can be used as a weapon. In the past, inmates have used scissors to stab other
 22 inmates or correctional staff. (*Id.*) As a result, the missing scissors presented a security
 23 threat to the institution. (*Id.*)

24 The lockdown from June 12 through 22, 2010 was required by the loss of .223
 25 caliber ammunition round on Facility B. (Maldonado Decl. ¶ 6.) By June 12, 2010,
 26 Captain Kuzil-Ruan had left Centinela State Prison and M. Maldonado was Acting
 27 Captain of Facility B. (Kuzil-Ruan Decl. ¶ 4; Maldonado Decl. ¶¶ 2-3.) On June 12,
 28 2010, Captain Maldonado was notified that a .223 caliber ammunition round was
 missing from Building One on Facility B. (Maldonado Decl. ¶ 6.) Captain Maldonado
 was concerned because an ammunition round contains gunpowder and can be used to
 manufacture a zip-gun or other explosive device for use as a weapon by inmates. (*Id.*)
 As a result, the missing ammunition round presented a security threat to the facility.
 (*Id.*)

29 The lockdown from August 17 through August 24, 2010 was required by a
 30 missing dental tool. ([Sais Decl.] ¶ 6.) At the time of the third lockdown, J. Sais was
 31 the Acting Captain of Facility B. (*Id.*) The dental tool was described as a dental spatula,
 32 but was actually a six-inch stainless steel rod. (*Id.*) Such metal tools can be sharpened
 33 and are frequently used by inmates as a weapon. (*Id.*) As a result, the dental tool

1 presented a security threat to the institution. (*Id.*)

2 As a result of the missing scissors, bullet, and dental tool, the Facility Captain
 3 determined that it was necessary to perform a methodical search of every cell and every
 inmate on Facility B. (Kuzil-Ruan Decl. ¶ 10; Maldonado Decl. ¶ 8; Sais Decl. ¶ 7.)

4 (ECF No. 74-11 at 8-9.)

5 Those declarations substantiate that the May, June, and August 2010 lockdowns were
 6 implemented to allow a systematic search for particular potential weapons. The maintenance of prison
 7 security is not only a legitimate, but a "compelling governmental interest." Greene, 513 F.3d at 988
 8 (finding a compelling government interest justified prison officials' total ban on group worship by high-
 9 security inmates for the purpose of ensuring prison security), *citing Cutter*, 544 U.S. at 725 n.13. That
 10 showing shifted the burden to Rogers to create a triable issue based on affirmative evidence beyond the
 11 pleadings that no compelling reason existed. Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256.

12 Rogers alludes in his opposition to "Interrogatory No. 8" as purportedly substantiating that
 13 "Defendants caused their own problems by overcrowding the prison system" so that "their own systemic
 14 problems then deprived Plaintiff of his RLUIPA rights" (ECF No. 81 at 7), but he does not produce any
 15 interrogatories. Moreover, that argument does not address Kuzil-Ruan's demonstration of compelling
 16 need for the particular lockdowns. Rogers acknowledges that personnel reductions at CEN affected
 17 the deployment of correctional staff to implement normal programing at the challenged times,
 18 irrespective of the causes of the reduced staffing. He infers that staffing reductions affecting the
 19 availability of security coverage for inmate movements and group assemblies cannot create a
 20 compelling government interest adequate to warrant suspension of group religious exercise when the
 21 staff shortage is purportedly the result of institutionally self-inflicted prison overcrowding. (See
 22 Findley Decl. Exh. A, ECF No. 74-7 at 35-47; ECF No. 81 at 9, arguing "no legitimate government
 23 purpose for the lockdowns exist[s] when overcrowding created Defendants[] problems"; *see* SAC at 6-
 24 7: defendants' "administrative failure" caused them to use "a relativism approach to impact their view
 25 of the 3% to 5% Redirection Plan" to create the rolling lockdowns "in-order to deceive the Court," after
 26 having "caused their own problems by overcrowding the prison system.") However, the RLUIPA does
 27 not "elevate accommodation of religious observances over an institution's need to maintain order and
 28 safety." Cutter, 544 U.S. at 722-23, 725 n.13; Greene, 513 F.3d at 988. A lack of resources to

1 adequately monitor and manage inmate group movements and assemblies indisputably raises
 2 institutional safety and security concerns.

3 Rogers creates no genuine issue of material fact when he simply expresses his hope that "after
 4 discovery is granted to Plaintiff" -- an option now entirely foreclosed in this case -- that "[t]his Court
 5 will determine if Defendants have a compelling government interest . . ." (ECF No. 81 at 9, *citing*
 6 Harris v. Pate, 440 F.2d 315, 318 (1971), a distinguishable prisoner civil rights case finding abuse of
 7 discretion in the trial court's refusal to grant plaintiff a continuance to obtain affidavits to support an
 8 opposition to defendant's dispositive motion, filed less than two months after the complaint.) Rogers
 9 represents in his Statement of Facts: "Discovery is required to show this Court the truth about Protestant
 10 services." (ECF No. 81 at 5.) That question and any answer to it are immaterial to the Motion
 11 resolution because the Court has already determined that confinement to in-cell religious observances
 12 during lockdown periods "substantially burdened" Rogers' participation in Saturday and Sunday group
 13 worship services within the meaning of the RLUIPA. (ECF No. 33 at 13.) The dispositive Motion
 14 questions are instead whether triable issues of fact exist that the suspensions of group religious assembly
 15 were in furtherance of a compelling institutional need served by the least restrictive means. As Kuzil-
 16 Ruan observes:

17 Plaintiff argues that the lockdowns were instituted for various improper purposes.
 18 (Opp'n at 6.) Plaintiff does not submit any evidence to support his position, but requests
 19 the Court to re-open discovery to allow him to attempt to uncover evidence of
 20 Defendant's nefarious purposes in ordering the lockdowns. (*Id.*) The Court has denied
 Plaintiff's motion to re-open discovery. (ECF No. 87.) Plaintiff has not submitted any
 evidence to rebut Defendant's undisputed evidence that there were compelling
 government interests in ordering each of the three ten-day lockdowns. Defendant is
 therefore entitled to summary judgment.

21 (ECF No. 88 at 6.).

22 The Court finds that Kuzil-Ruan carries her burden to advance undisputed facts that show
 23 suspension of group worship during the weapons searches and the rolling lockdown periods, when
 24 insufficient staff was available both to ensure the safety and security of the facility and to provide the
 25 necessary inmate monitoring required for group religious exercise, furthered a compelling government
 26 interest. Rogers fails to rebut that showing with any countervailing evidence.

27 **4. Least Restrictive Means**

[I]n light of RLUIPA, no longer can [defendants] justify restrictions on religious exercise by simply citing the need to maintain order and security in a prison." Greene, 513 F.3d at 988-89. While "prison security is a compelling state interest, and . . . deference is due to institutional officials' expertise in this area," Cutter, 544 U.S. at 725 n.13, more is required to avoid RLUIPA liability. Officials must show that they "actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." Warsoldier, 418 F.3d at 999. "If prison officials meet th[is] standard, the prison regulation passes muster under RLUIPA, regardless of the burden it imposes on religious exercise." Greene, 513 F.3d 990.

In support of her demonstration that confining religious exercise to in-cell during the lockdowns at issue was selected as the least restrictive means, Kuzil-Ruan describes the manpower requirements to control inmate movements and group assembly during normal religious programming:

During normal programming on Facility B, group worship services for all religions typically takes place in the chapel. (Kuzil-Ruan Decl. ¶ 5.) The chapel for Facility B is located within the Facility, but is separate from the housing units. (*Id.*) It is the same building as the canteen, law library, and the programming office, where the Facility Captain, Lieutenant, and Sergeant all have their offices. ([Maldonado Decl.] ¶ 4.) To access the chapel, an inmate must leave his housing unit, cross the yard, and enter the chapel. (Kuzil-Ruan Decl. ¶ 5.) There are risks associated with allowing inmates to be on the yard and to congregate in the chapel. (*Id.*) Inmates are able to barter goods and services, pass weapons, and communicate gang orders while in the chapel. (*Id.*) Also, any time there are inmates congregated in one area, there is a possibility of inmate-on-inmate violence, to which correctional officers must be able to respond. (*Id.*)

To attend a particular chapel service, the chaplain, with the assistance of inmate clerks, must place an inmate's name on a list. (*Id.* at ¶ 6.) The list is then delivered to the Inmate Assignment Officer to be included in the Daily Movement Sheet for all inmates. (*Id.*) The Daily Movement Sheet is then distributed to prison staff. (*Id.*) If an inmate has no restrictions that prevent him from attending chapel, he is permitted to attend. (*Id.*) At the time appointed for a particular service, inmates on the Daily Movement Sheet for that service are released from their cells and walk over to the chapel. (*Id.*) At least two correctional officers are on the yard at all times and one officer will process the inmates in and out of the chapel. (*Id.*) The officers will do periodic checks in the chapel to insure the safety of the inmates and the free staff volunteers working in the chapel. (*Id.*)

(ECF No. 74-1 at 7-8.)

Kuzil-Ruan explains the rationale and choices officials made regarding group services during the weapons searches:

There are five buildings on the [Facility B] yard. (Kuzil-Ruan Decl. ¶ 10; Maldonado Decl. ¶ 8; Sais Decl. ¶ 7.) Also, at that time, inmates were being housed in the gym. (*Id.*) Prison staff went through every cell in every building, and searched each inmate.

1 *(Id.)* Prison staff also searched the chapel, law library, and program office. *(Id.)*

2 During each lockdown, the Facility Captain considered whether group worship
 3 was possible. (Kuzil-Ruan Decl. ¶ 10; Maldonado Decl. ¶ 8; Sais Decl. ¶ 8.) Each
 4 Facility Captain filled out a document entitled "Program Status Report – Plan of
 5 Operation." *(Id.)* In doing so, each Facility Captain determined that recreation, canteen
 6 and phone calls would need to be suspended during the search. *(Id.)* Each Facility
 7 Captain also specifically considered allowing group religious services, before
 8 determining such services were not feasible for two reasons. *(Id.)*

9 First, all available correctional staff was engaged in the search for the potential
 10 weapon. (Kuzil-Ruan Decl. ¶ 11; Maldonado Decl. ¶ 9; Sais Decl. ¶ 9.) None of the
 11 correctional staff were available to be on the yard or outside the chapel to supervise
 12 services. *(Id.)* They would therefore not be able to respond to any inmate crimes, such
 13 as theft or violence among inmates. To pull officers away from the search would have
 14 extended the lockdown, and would have extended the suspension of services such as
 15 normal legal library access and non-critical medical appointments. *(Id.)*

16 Second, allowing inmates from different buildings within Facility B, or even
 17 from different cells within the same building, to congregate at the chapel would
 18 contaminate the search. (Kuzil-Ruan Decl. ¶ 12; Maldonado Decl. ¶ 10; Sais Decl. ¶
 19 10.) If inmates from a cell that had not been searched, were allowed to come into contact with
 20 inmates from a cell that had been searched, the inmates not yet subject to search could
 21 pass the weapon to the inmates who had already been searched. *(Id.)* After making this
 22 determination, each Facility Captain noted in his or her Program Status Report that
 23 religious services were modified to be "in-cell." (Kuzil-Ruan Decl. Ex. A; Maldonado
 24 Decl. Ex. A; Sais Decl. Ex. A.) Each Captain filled out the Program Status Reports
 25 throughout the lockdowns. *(Id.)*

26 (ECF No. 74-1 at 9-10.)

27 "Plaintiff concedes that if an inmate who is not on a list attends chapel there is a risk he will use
 28 the chapel as a way of committing crimes, including theft or a 'beatdown' of other inmates. (Rogers
 29 Dep. 49:25-50:15.)" (ECF No. 74-1 at 8.) Those undisputed facts substantiate that numerous
 30 correctional personnel are needed to safely implement the normal programming for group religious
 31 services. When a need arises to prioritize staff distribution in response to penological exigencies, such
 32 as the type of Facility-wide, labor intensive weapons searches that triggered the three ten-day lockdowns
 33 at issue, prison staff must necessarily be redirected to address the emergency. The search for potential
 34 weapons entailed inspection of every cell and every inmate and a lockdown to avoid search
 35 contamination through group contact such as for chapel purposes during that process. (Kuzil-Ruan
 36 Decl. ¶¶ 7, 9, 11-12; Maldonado Decl. ¶¶ 6-7, 9-10; Sais Decl. ¶¶ 6-7, 9-10.) The Declarations in
 37 support of the Motion substantiate that the availability of normal programming routines was
 38 unavoidably affected.

1 The daily Program Status Reports attached as Declaration exhibits substantiate that Kuzil-Ruan
 2 and her successor Captains considered the feasibility of permitting religious congregation programming
 3 to continue during the three ten-day lockdowns, as required under Greene, 513 F.3d at 988 and
 4 Warsoldier, 418 F.3d at 999. She summarizes their reasons for suspending those group gatherings as
 5 the least restrictive means to achieve the necessary ends.

6 All available correctional staff was engaged in the search for potential weapons. (Kuzil-
 7 Ruan Decl. ¶ 11; Maldonado Decl. ¶ 9; Sais Decl. ¶ 9.) There was not sufficient
 8 correctional staff available to be on the yard or outside the chapel to supervise services.
 9 (*Id.*) To pull officers away from the search would have extended the lockdown, and
 10 would have extended the suspension of services such as normal legal library access and
 non-critical medical appointments. (*Id.*) It also would have put the inmates
 congregating in the chapel at risk. (*Id.*) The inmates and free staff in the chapel could
 be the subject of inmate violence or other crimes to which correctional officers would
 not be able to respond. (*Id.*)

11 Additionally, allowing inmates from different buildings within Facility B, or even
 12 from different cells within the same building, to congregate in the chapel would
 13 contaminate the search. (Kuzil-Ruan Decl. ¶ 12; Maldonado Decl. ¶ 10; Sais Decl. ¶
 14 10.) The Captains considered that by allowing inmates from a cell that had not been
 searched to comingle with inmates from a cell that had been searched, the inmates not
 yet subject to search could pass the weapon to the inmates who had already been
 searched. (*Id.*)

15 (ECF No. 74-1 at 19; *see id.* at 19-20; *see* Kuzil-Ruan Decl. Exh. A (missing scissors search),
 16 Maldonado Decl. Exh. A (missing ammunition search), Sais Decl. Exh. A (missing dental instrument).)

17 Kuzil-Ruan similarly substantiates the rationale and decision process for each rolling lockdown
 18 day when religious exercise was modified. All but one of the Program Status Report form exhibits
 19 indicate religious exercise for each of the affected days was not entirely suspended, but rather was
 20 "modified" to be "in cell only." "For each day of the rolling lockdowns, the Facility Captains
 21 considered and rejected group worship" for lack of sufficient staff to cover prisoner movements to and
 22 from chapel, and they recorded on the Program Status Sheets that religious activity that day would be
 23 "in-cell" only, citing Kuzil-Ruan Decl. ¶16, Ex. B; Paul Decl. ¶ 5, Ex. A, and Sais Decl. ¶ 13, Ex. B.
 24 (ECF No. 74-1 at 19-20; *see also* Maldonado Decl. Exh. B.) "Having considered and rejected the
 25 efficacy of less restrictive means before adopting the challenged practice, Defendant and her successors
 26 met the standard under RLUIPA." (*Id.* at 10, citing Warsoldier, 418 F.3d at 999, Greene, 513 at 990.)

27 Rogers disputes that the choice to restrict inmates to in-cell only religious exercise during the
 28 lockdowns was the least restrictive means, relying on the Program Status record exhibits submitted in

1 support of the Motion to contend: "Plus, Defendants did not use the least restrictive means to deny
 2 Plaintiff's RLUIPA faith services when other self help programs were allowed to meet, canteen
 3 continued, packages were handed out, and visiting continued per Program Status Report." (ECF No.
 4 81 at 4, 7: "Defendants allowed self help groups to convene, such as: Wellness, KAIROS, AVP, and
 5 issued packages, canteen, and visiting during rolling lockdowns," citing specific pages from the Motion
 6 exhibits.) He summarily argues that if those activities were permitted, then "Defendants did not use the
 7 least restrictive means to suspend Plaintiff's Protestant faith." (*Id.* at 10.) In her Reply, Kuzil-Ruan
 8 highlights the evidentiary deficiencies in Rogers' representations and suggests factual distinctions
 9 between the permitted activities he identified compared to the demands on staff associated with group
 10 worship gatherings that informed the Facility B Captains' decisions. As she observes:

11 Plaintiff does not submit any evidence that these groups posed a similar security risk
 12 during lockdowns. Plaintiff does not submit evidence whether these groups met in the
 13 housing units or elsewhere. Plaintiff does not submit evidence of the numbers of
 14 inmates who attend these sessions. Absent such evidence, the fact that Plaintiff points
 15 to other programs that were allowed to continue for short periods of time does not rebut
 16 Defendant's evidence that she did not have adequate security to permit group worship.
 17 (ECF No. 88 at 4-5.)

18 Kuzil-Ruan demonstrates that she is entitled to judgment as a matter of law in that both
 19 categories of lockdown "further[ed] a compelling governmental interest, and d[id] so by the least
 20 restrictive means," Greene, 513 F.3d at 988, and Rogers raises no triable issue of material fact in
 21 opposition to that showing. As required under the RLUIPA, she substantiates both a compelling interest
 22 to maintain prison safety and security required suspension of group religious programming, and she
 23 shows the policy to restrict religious exercise to in-cell only during the lockdowns was adopted only
 24 after actual prior consideration and rejection of "the efficacy of less restrictive measures." Warsoldier,
 25 418 F.3d at 999; *see* Greene, 513 F.3d at 988-89; Cutter, 544 U.S. at 725 n.13. It is not the province
 26 of the Court to second-guess operational requirements within prisons or to substitute its own assessment
 27 of staffing needs and staff allocations to ensure the safety and security of the institution, its staff, and
 28 the inmates. *See* Thornburgh v. Abbott, 490 U.S. 401, 407-08 (1989) (courts must give appropriate
 deference to prison officials because "the judiciary is 'ill-equipped' to deal with the difficult and delicate
 problems of prison management") (citation omitted); Cutter, 544 U.S. at 723 ("Lawmakers supporting

1 RLUIPA anticipated that courts would apply the Act's standard with 'due deference to the experience
 2 and expertise of prison and jail administrators' ") (citation omitted).

3 Kuzil-Ruan's Rule 56 showing shifted the burden to Rogers to establish facts beyond the
 4 pleadings that show there remains a triable issue of disputed material fact on his RLUIPA claim so that
 5 summary judgment is not appropriate. Celotex, 477 U.S. at 324; Adickes, 398 U.S. at 157. He falls far
 6 short of that obligation when he summarily contends "Plaintiff has shown facts by [unspecified]
 7 exhibits" that require summary judgment be denied on grounds "Defendants are not willing to provide
 8 this Court and Plaintiff with key names of people involved in each three ten day lockdowns and
 9 Defendants have given bad faith declarations to support their actions . . ." (ECF No. 81 at 9.) Without
 10 making factual findings on the merits, the Court has considered all the evidence before it. Rogers'
 11 opposition arguments rely on conclusory allegations or mere speculation rather than probative evidence
 12 on which a jury could reasonably rely to find in his favor. Anderson, 477 U.S. at 249-50; Taylor, 880
 13 F.2d at 1045. His renewed calls for the Court to reopen discovery create no genuine issue of material
 14 fact for trial. Accordingly, Kuzil-Ruan's Motion is **GRANTED**.

15 **D. Availability Of Damages**

16 As an alternative argument to narrow the issues should the Court deny her Motion, Kuzil-Ruan
 17 contends she is entitled to a summary adjudication that damages are not an available remedy under the
 18 RLUIPA. (ECF No. 74-1 at 20.) Inasmuch as the Court finds she is entitled to summary judgment as
 19 a matter of law on the RLUIPA claim for the reasons discussed above, it need not reach this issue.

20 **E. Plaintiff's Ex Parte Application**

21 On January 25, 2013, about ten days after this Court issued its Order taking the fully-briefed
 22 summary judgment motion under submission (ECF No. 89), Rogers filed an Ex Parte Application
 23 seeking a "protective order for the court to distribute orders, notice, and judgments," citing Fed.R.Civ.P.
 24 83.3(f). (ECF No. 92.) He declares that he did not receive the Court's November 15, 2012 Rand notice
 25 and extension of time continuing the Motion hearing from December 17, 2012 to January 22, 2013 until
 26 January 18, 2013 (ECF No. 75), when he received defendant's Reply to his Opposition. He argues that
 27 "Defendants or this Court's clerk have intentionally interfer[ed] with Plaintiff's reception of this
 28 Court['s Nov. 15, 2012 Rand notice," and that he "filed, Dec. 7, 2012, Opposition without knowledge

1 of this Court's Rand Notice." (ECF No. 92.)

2 However, not only does the docket memorialize that "All non-registered users [were] served via
 3 U.S. Mail Service" with the November 15, 2012 Order (ECF No. 75), but also Rogers was provided with
 4 proper Rand advisements along with Kuzil-Ruan's Motion papers served November 13, 2012 (ECF No.
 5 74-2), removing any concern his purportedly belated receipt of the Court's redundant Rand notice in any
 6 way prejudiced the preparation of his summary judgment opposition. Moreover, the one month
 7 continuance of the hearing date had no effect on his ability to marshal the evidence, as discovery closed
 8 on October 15, 2012. (ECF No. 47.) Finally, any prospective instruction regarding the requirements
 9 of Fed.R.Civ.P. 83.3(f) is unnecessary, as the resolution of this Motion disposes of all parties and all
 10 claims in this action. Accordingly, the Ex Part Application is **DENIED** as both without merit and moot.

11 **III. CONCLUSION AND ORDER**

12 For all the foregoing reasons, **IT IS HEREBY ORDERED** Defendant's Motion For Summary
 13 Judgment is **GRANTED**, disposing of all remaining claims and defendants in plaintiff's Second
 14 Amended Complaint. The Clerk of Court shall enter judgment in favor of defendants and dismiss this
 15 action in its entirety, without leave to amend.

16 **IT IS SO ORDERED.**

17 DATED: February 26, 2013


 18 HON. IRMA E. GONZALEZ
 19 United States District Judge

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